Supreme Court, U.S.
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No. 99-1852

IN THE
Supreme Court of the United States

ROBERT B. SKLAROFF, M.D.

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
BY D. MICHAEL FISHER, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF
THE COMMONWEALTH OF PENNSYLVANIA,
and
PHILIP MORRIS INCORPORATED, ET AL.,

Respondents.

SUPPORTING The Petition For A Writ Of Certiorari
To The Pennsylvania Supreme Court

AMICUS CURIAE BRIEF
BY THE HONORABLE JON D. FOX, ESQUIRE

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AMICUS CURIAE BRIEF
BY THE HONORABLE JON D. FOX

The Honorable Jon D. Fox, Pennsylvania Congressman from 1994 until 1998, hereby submits this *Amicus Curiae* Brief in support of Petitioner Robert B. Sklaroff, MD[1], pursuant *inter alia* to Rule 37.

MOTION

1. Inasmuch as insufficient time existed to acquire formal consent from the Settling Parties for filing of this Brief, a motion has been prepared as if consent has been denied; consent will be requested from these Parties and the Court will be noticed (through filing of a Supplemental Brief) regarding the outcome.

2. Mr. Fox has served at numerous levels of government during the past three decades (Assistant District Attorney, Township Commissioner, State Representative, County Commissioner, and Congressman); therefore, he has gained significant and unique experience and expertise with particular regard to the appropriate exercise of governmental power.

3. The specific issues discussed in this Brief relate to the anticipated capacity of governmental entities to assert their rights on behalf of those they represent, plus how these responsibilities may be compromised if the Master Settlement Agreement is not modified.

4. Therefore, Mr. Fox respectfully requests that this Brief be accepted into the record.

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[1] This document was written in-part by Dr. Sklaroff, who financed its reproduction and submission; no other person, entity or organization contributed either to its authorship or to its preparation.

INTEREST OF MR. FOX

During his career, Mr. Fox has viewed government's chief roles as being Protector of and Guide for the Citizenry. Therefore, he would like the Master Settlement Agreement (effected between the Commonwealth of Pennsylvania and the Tobacco Industry) to ensure all governmental entities retain the capacity to assert rights of citizens they represent.

SUMMARY OF THE ARGUMENT

The Master Settlement Agreement must be amended by deletion of ¶ II (nn) and ¶ II (pp) for two reasons. First, regarding ¶ II (nn), no person or entity should be immunized with regard to future conduct of any type. Second, regarding ¶ II (pp), no governmental entity in Pennsylvania should be precluded from asserting the rights of citizens it represents.

As noted in the Writ, immunizing the Tobacco Industry with regard to future conduct is *ultra vires*, unprecedented, overly broad, complex, excessively ambiguous, and inconsistent with public policy. ¶ II (nn) should be deleted.

The Pennsylvania Attorney General is not empowered to indemnify any entity against litigation filed either by the Commonwealth of Pennsylvania or by its agents, officials, representatives, agencies, departments, commissions, divisions and subdivisions. ¶ II (pp) should be deleted.

The focus of this *Amicus Curiae* Brief is on the latter; attention will be given to the concerns expressed during 1999 by Philadelphia and Allegheny Counties for their citizens. Emphasized is the capacity of other states (California and New York) to have recognized existence of tobacco-related expenses incurred by governmental subunits and to have ensured that monies generated by the Master Settlement Agreement have been appropriated in a fashion consistent with the intent of the original Medicaid-based litigation. Assertion of such rights by counties led to a proper outcome; all of Pennsylvania's governments must be so-empowered.

ARGUMENT

1. Introduction

Dr. Sklaroff's Writ of Certiorari represents the last opportunity to **stop** the American legal system from placing its imprimatur on the Master Settlement Agreement without first establishing safeguards for the future. His ability to achieve standing to address key facets thereof will also determine whether other governmental entities, in addition, will be afforded the chance to improve this document.

Dr. Sklaroff has outlined multi-level issues that merit serious consideration including, in particular, concerns regarding the necessity to ensure the rights of all non-settling parties are honored in the process. This is consistent with the perspective articulated in the Minority Opinion authored by Commonwealth Court Judge James R. Kelley.

The focus of this Brief will be upon why the two counties with the largest populations in the Commonwealth have rights and responsibilities that have not been validated through this process, and that **should** be heard by the Court.

Four documents have been appended to this *Amicus Curiae* Brief, each elucidating a key facet of this litigation. The "Brief of the City of Philadelphia as *Amicus Curiae*" was filed in conjunction with the instant case; it was argued during the same two hearings (January 8 & 12, 1999) during which the filing by *inter alia* Dr. Sklaroff was analyzed.

A letter sent by Philadelphia Mayor Edward G. Rendell to Pennsylvania Attorney General D. Michael Fisher on December 3, 1998 elucidated the City's concerns. A letter sent by Dr. Sklaroff to Mayor Rendell on August 1, 1999 articulated the legal underpinning of the rationale to involve the City of Philadelphia in this litigation.

Testimony submitted by Dr. Sklaroff to Philadelphia City Council on May 24, 2000 regarding the Master Settlement Agreement articulated the rationale for empowering a governmental sub-unit to assert the rights of its citizens.

2. The County Perspective

The City of Philadelphia and the County of Allegheny have expressed concern regarding the MSA's far-reaching immunity clauses. Both viewed their interests as unaffected and, thus, both chose not to pursue the case to its legal terminus. The former expressed these views through an *Amicus Curiae* brief that was filed contemporaneous to oral argument in January 1999; the latter expressed these views through pursuit of an appeal to the Commonwealth Court. Also, counties (e.g., in Arizona) filed claims throughout America seeking reimbursement for tobacco-related costs; as a result, those in some states (e.g., New York and California) gained a sizable portion of annual MSA-generated allocated monies. This process led—legally and operationally—to recognition that the status of counties was **distinct** from that of the states in which they were located.

Pennsylvania is no different, and merits comparable mechanisms of recompense. [Indeed, Pennsylvania got half of the per-capita money as was received by the first four settling states (Mississippi, Florida, Texas and Minnesota). They also did not have to provide any future immunity to the tobacco companies, as Pennsylvania has been forced to do.] County governments incur distinct tobacco-related costs that cannot now be recovered (either from the Commonwealth or from the tobacco industry) except through indirect methods.

Briefs filed by the County of Allegheny and by the City of Philadelphia addressed both sides of this "coin," in that the former detailed its major categories of tobacco-related expenditures (e.g., health care clinics) and the latter focused on why it should be able to sue for any type of civil liability (e.g., non-self-extinguishing cigarettes that cause fires).

As was true with the non-governmental entities that suddenly discovered the MSA threatened their rights, these governmental sub-units found themselves subject to a legal hurdle from which they wanted prospective **exemption**. Clarification of this matter is pending.

3. Philadelphia

The City of Philadelphia determined that it was not a party to the MSA through a four-part "proof." The complete text of its filing has been appended hereto [Appendix A] because the arguments contained therein must be updated.

First, the City stated that it had the right to file an *Amicus Curiae* brief, an action that was not challenged by any party. Second, the City stated it considered filing an intervention petition improper for one reason [page 15, emphasis added]: "If indeed the defendants to this action felt that the claims of the City of Philadelphia are to be released by approval of this agreement, they had an opportunity, indeed, an **obligation** to file a petition for interpleader to bring the City of Philadelphia into the case as a party."

Because no such document was filed, the key rationale for the City's conclusion has been undermined. This is a three-step proof using a classic syllogism: "If P then Q." "Not Q." THEREFORE "Not P." The certainty that the City is not a party no longer exists (indeed, if it ever existed).

Third, the City concluded the Attorney General does **not** have the authority to release claims on behalf of the City, but it failed to recognize (as had been predicted in the letter sent by Dr. Sklaroff to the Mayor in August, 1999) the capacity of the Legislature to shake this level of confidence, later on.

Just a few days ago, in mid-June, 2000, the Pennsylvania Legislature passed House Bill 445, ostensibly intended to establish a policy regarding Non-Participating Manufacturers [pursuant to Exhibit T in the MSA]. Unfortunately, it also passed introductory language (that will, presumably, be signed into law by the Governor any day now) that could be invoked by the tobacco industry as expressing "intent" to be indemnified, not withstanding the presumed limits of power by the Attorney General to afford any entity such immunity. Specifically, it recognized the fact that MSA-monies were acquired in return for the granting of indemnification (http://www.legis.state.pa.us/WU01/LI/BI/ALL/1999/0/HB0445.HTM).

It omitted, however, the disclaimer that the Attorney General said should suffice without the need for a stipulation [i.e., that immunity was granted "to the full extent of the power of the signatories to release past, present and future claims"]. This key facet of the legislation is as follows:

> (5) On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement," with the Commonwealth. The Master Settlement Agreement obligates these manufacturers, in return for a release of past, present and certain future claims against those manufacturers as described therein, to. . .

Thus, Dr. Sklaroff testified before the Courts Subcommittee of the Pennsylvania House Judiciary Committee, asking that this phrase be deleted, inasmuch as its absence wouldn't affect the impact of the bill. Because this effort inexplicably failed, the tobacco industry can now argue that the Attorney General has been empowered to grant it "stealth immunity."

Fourth, the City concluded the Court should **require** the parties to clarify their position on the scope of the release. This was requested "in the interest of the public good [because] this Court is empowered to demand that the parties to the Agreement clarify their respective interpretations for the record." This plea, however, was not honored.

These issues had been cited in the letter previously sent by Mayor Rendell to the Attorney General [Appendix B]:

> Foremost among the City's concerns is the extent to which the Agreement purports to extinguish the rights of local governments to assert claims for monetary and injunctive relief against the tobacco industry defendants. As you know, under well-settled Pennsylvania law, the Commonwealth cannot extinguish the legal rights of Pennsylvania local governments to seek redress for harms and losses caused by tobacco products without formal legislative action.

> In addition, the draft agreement purports to release the tobacco industry defendants from liability for damages for future conduct, acts or omissions related to the use of or exposure to tobacco products. If the Agreement binds local governments to any degree, it is problematic to the City that [this] Agreement could be interpreted as insulating the tobacco industry defendants from liability for future misconduct.

In a letter subsequently sent to the Mayor [Appendix C], Dr. Sklaroff updated this issue, based upon a point-by-point response to the City's *Amicus Curiae* brief. The inescapable conclusion here is that a county government's core concerns still remain inexplicably **unclarified** by the settling parties at the level of the United States Supreme Court.

Thus did the City articulate fundamental forces that have driven Dr. Sklaroff's litigation. The only recourse available currently to achieve such clarification is through stipulation, and the only method available to acquire binding language is through remand to the Philadelphia Court of Common Pleas.

4. Allegheny County

Allegheny County filed a brief with Commonwealth Court supporting its appeal of having been denied standing. Therein, two ways the MSA empowers state government to facilitate the tobacco industry in limiting future litigation were articulated (pages 29-30). Because the Commonwealth has retained and/or claimed the right to approve any future settlement which others might reach in their own right, it has potentially interposed a previously non-existent defense to lawful pursuit of collective claims. And the Commonwealth has agreed not to assist or encourage (directly or indirectly) "any challenge to the [MSA] or any Consent Decree by any other person, and will support the integrity and enforcement of the terms of the Agreement and the Consent Decrees."

The tobacco industry has thus precluded government from voicing future concerns on behalf of the citizenry.

No opinion issued in this matter has scrutinized the MSA to the degree necessary to "reach" assessment of such basic considerations as these. Furthermore, Allegheny County withdrew its Commonwealth Court appeal before its merits could be reviewed (beyond Judge Kelley's Opinion).

The Commonwealth Court permitted this withdrawal to occur absent submission of a proper application—violations of procedure detailed by Judge Kelley—but the PA Supreme Court denied Dr. Sklaroff's Petition for Review of this particular issue. In any case, concerns raised by Allegheny County will also remain unresolved until/unless they are aired following remand to the Court of Common Pleas.

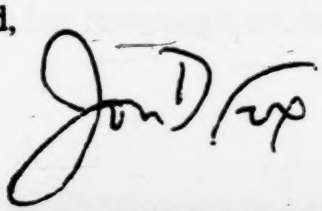
5. Implications

Dr. Sklaroff recently testified before Philadelphia City Council with regard to the proper disposition of MSA-related monies (from both state-wide and county-level perspectives). Therein, he detailed a comparable point-by-point response to the City's initial *Amicus Curiae* brief, again concluding that supporting this legal effort was the only way the City could be assured a myriad of under-funded Medicaid-related projects would receive long-term support through the MSA. Indeed, such argument remains unrefuted [Appendix D].

CONCLUSION

The Writ of Certiorari filed by Robert B. Sklaroff, MD must be **granted** because fundamental Constitutional issues related *inter alia* to the rights and responsibilities of counties (governmental sub-units) should be heard in court prior to their implementation via the Master Settlement Agreement.

Respectfully Submitted,



APPENDIX

Due to space-limits [20 pages for an *Amicus Curiae Brief*], these documents have been reformulated as "Lodging #2."

A. Brief of the City of Philadelphia, as *Amicus Curiae*

B. Letter by Edward G. Rendell, Mayor of Philadelphia

C. Letter by Robert B. Sklaroff, MD

D. Testimony by Robert B. Sklaroff, MD